

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Respondent.

No. CR 89-0106 LKK JFM P

vs.

RICHARD AICHELE,

Movant.

ORDER AND

FINDINGS AND RECOMMENDATIONS

Movant is a federal prisoner<sup>1</sup> proceeding in propria persona with a motion to amend his presentence report. Respondent sought leave to file a late opposition to the motion. Good cause appearing, respondent's request will be granted. Respondent's opposition is deemed timely filed.

Both movant and respondent agree that the PSI report contains an error in the number of years movant was sentenced to on a prior conviction referenced in the PSI report. Moreover, respondent also conferred with the United States Probation Officer ("USPO") concerning this complaint and the USPO "concurs that Aichele's presentence report incorrectly states his sentence for the prior 1969 conviction of violating Cal. Penal Code Section 4573.6 as six months to fifteen years" (Response at 7) rather than the correct sentence of six months to five years. Movant avers that this error causes him collateral consequences in terms of his

<sup>1</sup> Movant was sentenced on July 10, 1990 to 365 months in federal prison, and a 5 year term of supervised release. (Response at 1.)

1 classification and housing in the federal prison system; movant seeks correction of the PSI report  
2 and a re-calculation of his guideline score.

3           However, respondent contends that this court lacks jurisdiction to hear this  
4 motion, the motion is barred by the statute of limitations and movant has failed to exhaust his  
5 administrative remedies with the Board of Prisons.

6           To “provide[ ] for focused, adversarial development of the factual and legal issues  
7 relevant to determining the appropriate Guidelines sentence,” Burns v. United States, 501 U.S.  
8 129, 134 (1991), Rule 32(c) requires a probation officer to conduct a presentence investigation  
9 (PSI) and issue a report which the district court must consider in sentencing. See Fed. R. Crim.  
10 P. 32(c). At least 35 days prior to sentencing, the PSI report must be disclosed to the defendant  
11 and his attorney, see Fed. R. Crim. P. 32(e), and the district court must determine at sentencing  
12 whether defendant and his attorney have had the opportunity to read and discuss the report, Fed.  
13 R. Crim. P. 32(i). Rule 32(f) provides that a defendant may challenge factual inaccuracies  
14 contained in a PSI report within 14 days after receiving the report. Id.

15           “[F]or any disputed portion of the presentence report or other controverted  
16 matter— [the court must] rule on the dispute or determine that a ruling is unnecessary either  
17 because the matter will not affect sentencing, or because the court will not consider the matter in  
18 sentencing.” Fed. R. Crim. P. 32(i)(3)(B). A written record of such findings and determinations  
19 shall be appended to and accompany any copy of the presentence investigation report thereafter  
20 made available to the Bureau of Prisons or the Parole Commission. Fed. R. Crim. P. 32(i)(3)(C).

21           Once the district court has heard objections to the report and has imposed  
22 sentence, the district court's jurisdiction over the defendant becomes limited. See, e.g., Fed. R.  
23 Crim. P. 35 (district court may correct illegally imposed sentence only within seven days after  
24 imposition of sentence); United States v. Johns, 638 F.2d 222, 224 (10th Cir.1981) (district court  
25 lacks jurisdiction to consider Rule 35 motion to correct sentence after defendant's appeal is filed).  
26 Thus, post-sentence challenges to a PSI report which are submitted to the district court must be

1 based on statutes or rules which give the district court jurisdiction to consider the challenge. See  
 2 generally Knopp v. Magaw, 9 F.3d 1478, 1479 (10th Cir.1993) (subject matter jurisdiction must  
 3 attach before district court may exercise its power).

4           The language of Rule 32(i)(3)(B) presumes that objections to the PSI report will  
 5 be dealt with only as they affect sentencing, and contemplates that movant must challenge errors  
 6 contained in the PSI report prior to the imposition of sentence and ensures that movant receives  
 7 (1) a fair sentence based on accurate information and (2) a clear record of the resolution of  
 8 disputed facts. See United States v. Gattas, 862 F.2d 1432, 1434 (10th Cir.1988) (noting these  
 9 two important functions of Rule 32); see also United States v. Engs, 884 F.2d 894, 896 (5th  
 10 Cir.1989) (rule contemplates objections to PSI report prior to sentencing when resolution of  
 11 disputed matters will most benefit defendant); United States v. Freeny, 841 F.2d 1000, 1002 (9th  
 12 Cir.1988) (Rule 32 allows challenge to presentence report during imposition of sentence, not  
 13 later). Thus, “the language of Rule 32. . . offers no basis for empowering the sentencing court to  
 14 hear postsentence challenges to [a] PSI report.” Engs, 884 F.2d at 896. Rule 32, standing alone,  
 15 cannot provide a district court with jurisdiction to hear challenges to a presentence report once  
 16 sentence has been imposed.<sup>2</sup> See id.; United States v. Catabran, 884 F.2d 1288, 1289 (9th  
 17 Cir.1989); United States v. Giaimo, 880 F.2d 1561, 1563 (2d Cir.1989); United States v. Sarduy,  
 18 838 F.2d 157, 158 (6th Cir.1988); United States v. Fischer, 821 F.2d 557, 558 (11th Cir.1987).  
 19 Thus, the motion to amend should be denied for lack of jurisdiction to consider the matter.

20           Although this court lacks jurisdiction to consider the motion under Fed. R. Crim.  
 21 P. 32, pro se pleadings must be construed liberally. The court has considered whether to construe  
 22 the motion as a § 2255 motion. However, in the instant case, this court declines to construe the

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 24           <sup>2</sup> The advisory committee notes to Fed. R. Crim. P. 32 indicate that a defendant has a  
 25 continuing interest in an accurate and reliable presentence report after the imposition of sentence,  
 26 but nothing suggests Rule 32 creates a jurisdictional basis for federal district courts to hear a  
 postsentence application to correct a presentence report. See, e.g., United States v. Ursillo, 786  
 F.2d 66, 70 (2d Cir.1986) (advisory committee notes inconclusive as to whether Rule 32  
 provides jurisdictional basis for postsentence attack on presentence report).

1 Rule 32 motion as a § 2255 motion because it is apparent from the movant's filing that he did not  
2 intend the motion to be so construed. Movant has previously filed two § 2255 motions; one was  
3 heard on the merits. The other was denied as successive. Thus, any subsequent § 2255 motion  
4 would be subject to challenge as successive. See Rule 9(b) of the Rules Governing Section 2255  
5 Proceedings (successive petition may be dismissed if new and different grounds for relief are  
6 alleged). Accordingly, this court declines to construe the Rule 32 motion as a § 2255 motion.

7           The court has also considered whether the presentence report could be amended  
8 pursuant to Fed. R. Crim. P. 36. Rule 36 provides that clerical mistakes in judgments, orders or  
9 other parts of the record "may be corrected by the court at any time." Id.; see also United States  
10 v. Knockum, 881 F.2d 730 (9th Cir. 1989)(district court ordered to forward a transcript of the  
11 sentencing hearing to the Bureau of Prisons to be attached to the PSI report based on Fed. R.  
12 Crim. P. 36.) Motion to vacate sentence could be construed as including motion for relief under  
13 rule relating to correction of sentence, to correct clerical error of district court in failing to attach  
14 to presentence report written finding that it did not take controverted matters into account in  
15 sentencing. Doganieri v. U.S., 914 F.2d 165 (9th Cir. 1990), cert. denied, 499 U.S. 940 (1991).

16           However, the rule permitting correction of clerical mistakes in records arising  
17 from oversight or omission did not permit substantive modification of erroneous sentence. U.S.  
18 v. Kuhl, 816 F.Supp. 623 (S.D.Cal.1993).

19           Because movant seeks re-calculation of his sentence under the sentencing  
20 guidelines, the court may not correct this error under Fed. R. Crim. P. 36. Any claims concerning  
21 incorrect calculation of his sentence under the guidelines must be challenged by motion to  
22 vacate, set aside or correct the sentence under 28 U.S.C. § 2255. But, as noted by respondent,  
23 such a motion would be time-barred as movant only had one year to file such a motion.

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1 The statute of limitations with respect to § 2255 motions reads as follows:

2 1-year period of limitation shall apply to a motion under this  
3 section. The limitation period shall run from the latest of--

4 (1) the date on which the judgment of conviction becomes final;

5 (2) the date on which the impediment to making a motion created  
6 by governmental action in violation of the Constitution or laws of  
the United States is removed, if the movant was prevented from  
making a motion by such governmental action;

7 (3) the date on which the right asserted was initially recognized by  
8 the Supreme Court, if that right has been newly recognized by the  
Supreme Court and made retroactively applicable to cases on  
collateral review; or

9 (4) the date on which the facts supporting the claim or claims  
10 presented could have been discovered through the exercise of due  
11 diligence.

12 28 U.S.C. § 2255 ¶ (6).

13 Movant's conviction became final on July 24, 1990, when the time within which  
14 movant could file an appeal expired. See Fed. R. App. P. 26(a) & 4(b)(1)(A)(i); U. S. v. Colvin,  
15 204 F.3d 1221, 1224 (9th Cir. 2000). Under section (1) of the statute of limitations, the  
16 limitations period expired on July 23, 1991. Movant filed the instant motion on June 21, 2007.  
17 Movant has presented no evidence of government impediment or newly-recognized Supreme  
18 Court authority. The facts supporting this claim could have been discovered at sentencing by a  
19 careful review of the PSI report. Movant has made no argument in support of equitable tolling.  
20 Equitable tolling of the limitations period is available "if extraordinary circumstances beyond a  
21 prisoner's control make it impossible to file a petition on time." Miles v. Prunty, 187 F.3d 1104,  
22 1107 (9th Cir. 1999). Given the length of time, it is unlikely movant could demonstrate such  
23 extraordinary circumstances covering the 16 year period of time.

24 Finally, the court notes that movant is not without recourse to accomplish the  
25 correction of this clerical error through administrative channels. Movant may seek correction of  
26 the error and re-calculation of his sentence by pursuing his administrative remedies with the

1 Bureau of Prisons. The Bureau of Prisons has administrative procedures in place to accomplish  
2 corrections in the PSI report. (See Resp.'s August 3, 2007 Response at 6-7; Ex. 1.)

3 IT IS HEREBY ORDERED that respondent's August 3, 2007 request for late  
4 filing is granted; the opposition is deemed timely filed.

5 IT IS HEREBY RECOMMENDED that movant's June 21, 2007 motion to amend  
6 his presentence report be denied.

7 These findings and recommendations are submitted to the United States District  
8 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty  
9 days after being served with these findings and recommendations, any party may file written  
10 objections with the court and serve a copy on all parties. Such a document should be captioned  
11 "Objections to Magistrate Judge's Findings and Recommendations." The parties are advised that  
12 failure to file objections within the specified time may waive the right to appeal the District  
13 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

14 DATED: September 5, 2007.

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17 UNITED STATES MAGISTRATE JUDGE

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